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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROB WARDEN, CHICAGO LAWYER and SANDRA BIETILA,

Petitioners,

v.

HONORABLE ROBERT A. NOLAN, Judge of the Circuit Court of DuPage County,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF CASE

Petitioner, Sandra Bietila, has never appeared in the Circuit Court of DuPage County. The first instance wherein Petitioner Bietila appeared was before the Illinois Supreme Court, and did so without ever having sought leave to intervene in those proceedings and without having sought any relief at the trial court level. Before this Court and before the Illinois Supreme Court, she has sought to have the March 3, 1986 order reviewed as to her asserted con-

stitutional interests, based solely on her own affidavit and without the factual underpinning which ordinarily is appropriate before difficult constitutional questions will be reviewed.

The proceedings which culminated in the March 3 order followed the purported confession of Brian Dugan to the Jeanine Nicarico murder for which Stephen Buckley is awaiting retrial. A massive investigation was undertaken by authorities to ascertain the validity of that confession. The exhibits introduced on February 27 and 28 included video tapes of television newscasts and newspaper articles concerning that investigation. A common sense review of those exhibits indicates that the individuals who were subjected to the March 3 order were providing details of the investigation to members of the press.

Contrary to Petitioner's statement, the Special State's Attorney did not appear "as a proponent of new restraints." (Petition for Writ of Certiorari to the Supreme Court of Illinois, page 5.) The hearing held by Judge Nolan was specifically held as a result of Judge Nolan's decision to allow Petitioners and others to intervene and file motions to vacate certain prior orders.

During the hearing on February 27 and February 28, Judge Nolan reviewed a voluminous court file (four volumes) and removed from the court file, in the presence of Petitioners, Warden and *Chicago Lawyer*, a document or documents which were placed in a small manila envelope. The remainder of the court file was then made available for inspection to Petitioners, Warden and *Chicago Lawyer*, and their counsel.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS DO NOT HAVE A FIRST AMENDMENT RIGHT OF ACCESS EITHER TO STATEMENTS OF INDIVIDUALS SUBJECT TO THE JURISDICTION OF THE COURT OR TO COURT RECORDS.

Fundamental to the arguments of Petitioners is the presumption that all of the matters covered by the March 3 order fall under the umbrella of protections afforded by the First Amendment. It is important to note that the Order of March 3, 1986, does not prohibit the Petitioners or any other member of the public from attending either the trial or any pretrial proceeding; does not prohibit the Petitioners or any other member of the press or public from reporting on the case of *People v. Buckley*, 84 CF 362; allows the press and the public to obtain and examine transcripts of Stephen Buckley's prior trial; allows the inspections of some four volumes of the common law record in *People v. Stephen Buckley*. The only material contained in the court file which is not available to the Petitioners for inspection are certain portions of the transcripts of proceedings from December 15, 1985 to January 21, 1986 and a certain document or documents which were sealed in a small manila envelope in the presence of the Petitioners, Rob Warden and *Chicago Lawyer*.

Furthermore, the Order of March 3, 1986, does not preclude all discussion of the case of *People v. Stephen Buckley*, 84 CF 362, by individuals that are subject to the court's inherent powers. Rather, the order imposes limited restrictions to secure a fair trial for both the State and the defendant. The essence of the right asserted by the Petitioners does not concern their freedom to publish,

but rather the so-called "right of access" which the Petitioners maintain is of constitutional stature. As to either the court record in *People v. Buckley*, 84 CF 362 (Circuit Court of the Eighteenth Judicial Circuit, DuPage County, Illinois), or the communications with attorneys of record and others, this Court has never recognized a First Amendment "right of access".

A. Official Court Records And Documentary And Physical Evidence Do Not Qualify For Constitutional Protection.

It is true that judicial records are ordinarily to be available for public inspection. Contrary to Petitioners' arguments, such a right is rooted in the common-law and not the First Amendment to the United States Constitution. (*United States v. Edwards* (7th Cir. 1982), 672 F.2d 1289.) However, the right to inspect and copy judicial records is not absolute.

> "Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. [Citations omitted.]
>
> * * *
>
> It is difficult to distill from the relatively few judicial decisions a comprehensive definition of what is referred to as the common-law right of access or to identify all the factors to be weighed in determining whether access is appropriate. The few cases that have recognized such a right do agree that the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." (Footnotes omitted.) *Nixon v. Warner Communications, Inc.* (1978), 435 U.S. 589, 598-599, 55 L.Ed.2d 570, 98 S.Ct. 1306, 1312-1313.

In *United States v. Edwards* (7th Cir. 1982), 672 F.2d 1289, the press sought and was denied access to an audio recording admitted into evidence. In deciding that the trial court did not abuse its discretion in denying access to this recording, the court of appeals recognized that the right relied upon by the press was of non-constitutional origin and that in a given case, a number of factors may militate against public access. (See also *Nixon v. Warner Communications, Inc.* (1978), 435 U.S. 589, 55 L.Ed.2d 570, 98 S.Ct. 1306; *Belo Broadcasting Corp. v. Clark* (5th Cir. 1981), 654 F.2d 423; *United States v. Torres* (N.D. Ill. 1985), 602 F.Supp. 1458.)

While a common law right of access may exist as to judicial records, that right is subject to the inherent powers of the court to limit access to those records. Here, upon a careful review of the voluminous record, Judge Nolan restricted access to only a small portion of the record. The publicity which has surrounded the alleged Dugan confession and the intense scrutiny which the *Buckley* case has received, is more than ample justification for the limited restrictions imposed. The responsibility of the trial court to insure the fair administration of justice and to secure for the defendant his constitutional right of a fair trial justifies restricting access to judicial records when publicity threatens the fairness of the proceeding.

This court has consistently recognized the potential dangers which accompany pretrial proceedings.

In *Gannett Co., Inc. v. DePasquale* (1979), 443 U.S. 368, 61 L.Ed.2d 608, 99 S.Ct. 2898, this Court recognized the affirmative constitutional obligation which the trial court has in safeguarding these rights.

> "This Court has long recognized that adverse publicity can endanger the ability of a defendant to receive a fair trial. [Citations omitted.] To safeguard the due

> process rights of the accused, *a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity.* [Citation omitted.] And because of the Constitution's pervasive concern for these due process rights, a trial judge may surely take protective measures *even when they are strictly and inescapably necessary.*" (Emphasis added.) 99 S.Ct. at 2904.

Petitioners cite no authorities which suggest there exists a First Amendment right of access to court records and files and hence, no constitutional issues are raised that would merit review by this Court.

B. No First Amendment Right Of Access Exists As To Attorneys, Court Personnel And Law Enforcement Agencies.

The Petitioners also implicitly argue that they possess a First Amendment right of access to attorneys, court personnel, and law enforcement personnel. Such a right does not exist.

The Petitioners are correct in asserting that lawyers appearing in a case are particularly useful sources of information concerning pending litigation. However, lawyers are also proponents of a particular position in an adversarial system and can be the source of prejudice to the opposing party or to the State's interest in maintaining the fairness of proceedings.

> "Because such a system relies deliberately on highly partisan advocacy by counsel, both in shaping and moving litigation along, it is especially vulnerable to the natural human tendency of counsel to enlist extraneous influences in behalf of their causes and to take the structured battle of the litigation process 'into the streets,' or into the public forum afforded by the free press." *Hirschkop v. Snead* (4th Cir. 1979), 594 F.2d 356, 377 (J. Phillips, concurring).

In *Sheppard v. Maxwell* (1966), 384 U.S. 333, 16 L.Ed.2d 600, 86 S.Ct. 1507, this Court reversed the defendant's conviction because of pretrial publicity. In reaching its decision, the Supreme Court commented upon some of the restrictions the trial court should have imposed.

> "[T]he court should have made some effort to control the release of leads, information and gossip to the press by police officers, witnesses, and counsel for both sides.
>
> * * *
>
> [W]e must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." 384 U.S. at 359, 363, 16 L.Ed.2d at 618, 620. See *Nebraska Press Ass'n v. Stuart* (1976), 427 U.S. 539, 49 L.Ed.2d 683, 96 S.Ct. 2791, 2800.

To recognize a First Amendment right of access to these individuals and impose the "substantial probability" test recognized in *Press Enterprise Co. v. Superior Court*, ____ U.S. ____, 39 Cr.L. 3253 (No. 84-1560, decided June 30, 1986), would effectively deprive the trial court of perhaps one of the most reasonable means of securing fair trial guarantees for both the State and the defendant.

There is no doubt that the State has a substantial interest in ensuring the fairness of judicial proceedings. (*Sheppard v. Maxwell* (1966), 384 U.S. 333, 16 L.Ed.2d 600, 86

S.Ct. 1507; *Singer v. United States* (1965), 380 U.S. 24, 13 L.Ed. 2d 630, 85 S.Ct. 783; *In re Sawyer* (1959), 360 U.S. 622, 666, 3 L.Ed.2d 1473, 1499, 79 S.Ct. 1376, 1397 (Frankfurter, J., dissenting.) Courts have recognized that restricting extra-judicial statements of criminal defense attorneys relates to the government's substantial interest in preserving the proper administration of justice and the basic integrity of the judicial process. (See *Singer v. United States* (1965), 380 U.S. 24, 13 L.Ed.2d 630, 85 S.Ct. 783.) These rights and interests can be impaired by lawyers' unrestrained, prejudicial comments pending trial. (See *Irwin v. Dowd* (1961), 366 U.S. 717, 6 L.Ed.2d 751, 81 S.Ct. 1639.)

Judge Nolan acted carefully to discharge his affirmative constitutional duty to secure to the State and the defendant a fair proceeding. Since no First Amendment right of access has ever been recognized as to court files or individuals subject to the jurisdiction of the trial court, this case does not merit review by this Court.

C. The Withholding Of Certain Limited Transcripts Does Not Violate Any Rights Of Petitioners.

In his March 3 order, Judge Nolan withheld transcripts of the proceedings which occurred between December 15, 1985 and January 21, 1986. Subsequently, a portion of these transcripts were released. Respondent submits that withholding of these transcripts was not error.

Although in *Press Enterprise Co. v. Superior Court*, ____ U.S. ____, 39 Cr.L. 3253 (No. 84-1560, decided June 30, 1986), this Court recognized that a qualified First Amendment right of access attaches to preliminary hearings, this Court has yet to hold that such a right attaches to other pretrial proceedings. Historically, the public had

no right to attend pretrial proceedings. (See *Gannett v. DePasquale*, 443 U.S. 368, 61 L.Ed.2d 608, 99 S.Ct. 2898 (1979).) The Court in *Gannett* approved of the closure of a pretrial suppression hearing and sealing transcripts of that hearing, based upon a finding that an open proceeding would pose a "reasonable probability of prejudice to these defendants." Here, Judge Nolan specifically found that the transcripts being withheld bore upon the identity, testimony and credibility of potential witnesses and were the subject matter of ongoing investigations. The Court also found that there had been a great deal of media coverage of the instant cause, including but not limited to alleged statements, identity or credibility of potential future witnesses and that Defendant Buckley's previous trial resulted in a mistrial. Judge Nolan found that the rights of the Petitioners were outweighed by a need to secure fair trial guarantees to the State and the Defendant.

Assuming arguendo that a First Amendment right of access existed as to the proceedings which remained sealed, such a right was found to be outweighed by the interests of the State and the defendant. As in *Gannett*, no error was committed by the Respondent on entering the March 3 order and review of that decision is not warranted.

II.

THE CLAIMS OF PET'TIONER, SANDRA BIETILA, SHOULD NOT BE REVIEWED BY THIS COURT.

Petitioner Bietila has never appeared before the Respondent and advanced the claims she now seeks to have reviewed. Rather, Petitioner Bietila appeared for the first time in the second *mandamus* proceeding filed in the

Illinois Supreme Court. (*Warden v. Nolan*, No. 63318.) The only source to identify Ms. Bietila's interest is her own affidavit filed in the Illinois Supreme Court, an affidavit full of conclusions. Although she asserts that certain of her constitutional guarantees have been infringed, the case in its present posture lacks the concrete adverseness which sharpens the issues to illuminate difficult constitutional questions. (See *Flast v. Cohen* (1968), 392 U.S. 83, 20 L.Ed.2d 947, 88 S.Ct. 1942 (1968).) In light of the present record, the claims of Petitioner Bietila should not be reviewed.

III.

AMPLE NOTICE WAS GIVEN OF THE PROCEEDINGS WHEREIN PETITIONERS CHALLENGED THE RESPONDENT'S PROTECTIVE ORDERS.

Although Petitioner Bietila asserts that she did not have notice of the proceedings which culminated in the March 3 order, ample notification was given. On February 4, 1986, an article appeared in the *Chicago Sun-Times*, a newspaper of general circulation in the six-county greater metropolitan Chicago area, headlined "Gag Order Is Challenged in Nicarico Case." This article described the efforts by Petitioners, Warden and *Chicago Lawyer*, to vacate the protective orders entered by Judge Nolan on December 23, 1985, January 6, 1986, and January 10, 1986. (People's Exhibit 10a from February 27-28 hearing.) That article indicated the next hearing date was February 19, 1986 before Judge Nolan. On February 20, 1986, an article appeared in the *Chicago Tribune* headlined "Nicarico gag order open to challenge." (People's Exhibit 11a from hearing of February 27-28, 1986.) The article stated that a hearing on the "ACLU's motion" was set for next Thursday.

In light of the publicity given to the efforts of Petitioners Warden and *Chicago Lawyer*, what more notice could have been given. Whether or not notice is required is not determinative, since notice was in fact given. This Court should not be called upon to decide abstract propositions.

CONCLUSION

The arguments of Petitioners presume that constitutional rights have been infringed. Respondent respectfully submits that as to the court record and communications by attorneys and others, no First Amendment right of access exists. As to the portions of court transcripts that remain sealed, any rights of Petitioners have been adequately protected. As to Petitioner Bietila, her failure to ever appear in the trial court and seek to intervene in these proceedings is fatal to her request that this Court review her claim of error.

WHEREFORE, Respondent prays that this Court deny the Petition for Writ of Certiorari to the Supreme Court of Illinois.

Respectfully submitted,

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